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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 245

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS AND THEODORE J. ISAACS, DIRECTOR OF REVENUE, APPELLANTS

v.

UNITED STATES OF AMERICA AND OLIN MATHIESON CHEMICAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

The facts of this case are simple and undisputed. Appellee Olin Mathieson Chemical Corporation, like many other companies, sells to appellee United States, in the State of Illinois, large quantities of materiel. Illinois claims taxes against the vendor, Olin Mathieson, based upon the receipts from its sales. Under the contracts of sale between them, the United States is obliged to reimburse Olin Mathieson to the extent that the latter is required to pay the claimed taxes. In a suit instituted by appellees, a three-judge district court has enjoined the responsible Illinois officials from assessing or collecting taxes on sales to the United States, on the

ground that the state statute[1] is unconstitutionally discriminatory in that it provides no exemption for sales to the United States but does provide exemptions in the case of sales to the State of Illinois, its political subdivisions, agencies and instrumentalities and to charitable, religious and educational organizations. We believe that the District Court's conclusion that the tax is discriminatory is clearly correct and that the decision was plainly required by this Court's recent decision in *Phillips Co.* v. *Dumas School District,* 361 U.S. 376.

We also submit that the District Court was correct in its rulings that appellees had standing to bring the suit; that suit is not barred by the Eleventh Amendment to the United States Constitution; and that there is no statutory obstacle to the issuance of the injunction since a "plain, speedy and efficient remedy" (28 U.S.C. 1341) is not available in the state courts (*Livingston* v. *United States,* 364 U.S. 281, affirming, without opinion, 179 F. Supp. 9). Since, for reasons set forth below, we are refraining from filing a motion to affirm the judgment, we do not here elaborate on the opinion of the district court, which, in all events, adequately sets forth the basis for the court's holdings. See, also, *United States and Phillips Petroleum Co.* v. *Bureau of Revenue of New Mexico,* not yet reported (C.A. 10, May 16, 1961).

Subsequent to entry of the District Court's judgment, the Supreme Court of Illinois, in a taxpayer's suit, similarly ruled that the exemption provisions of the taxing statute were discriminatory and hence

[1] Ill. Rev. Stat. 1959, C. 120 Sec. 440 ff.

unconstitutional and void. *People ex rel. Holland Company* v. *Isaacs, Director of Revenue*, March 19, 1961, reprinted in the Jurisdictional Statement, pp. 45–49.

On June 9, 1961 (which was after notice of appeal to this Court had been filed in the instant case), appellants filed an application with the District Court for vacation or modification of its injunction in light of the Illinois Supreme Court's decision in *Holland* and new regulations in implementation thereof issued by the Illinois Department of Revenue. In addition, certain educational, religious and charitable institutions filed a motion in the District Court for leave to intervene as *amici curiae*. The United States moved to dismiss appellants' application on the ground that the District Court is without jurisdiction to act on it because of the pendency of this appeal. On August 21, 1961, the three-judge District Court sustained the motion to dismiss for lack of jurisdiction and also denied the petition for intervention by the *amici curiae*.

Thereafter, on June 30, 1961, the Illinois legislature amended the taxing statute in question, removing the exemption previously accorded to the state and its instrumentalities but retaining an exemption for sales to charitable religious and educational institutions.[2]

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[2] H. B. 1609, Laws 1961, amended Section 2 of the Illinois Retailers' Occupation (Sales) Tax Act (Ill. Rev. Stat. 1959 C. 120, Sec. 441) to read in pertinent part:

"Sec. 2. Tax on business of selling tangible personal property at retail—A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate

Appellants, failing to note the subsequent action of the Illinois legislature, urge in this Court that, apart from the merits of the decision below, there is no longer any need for an injunction. We disagree.

First, it appears from a bulletin issued by the Illinois Department of Revenue on July 10, 1961 (after issuance of the regulations relied on by appellants and the amendment of the taxing statute by the Illinois legislature) that the Director of Revenue does not propose to collect taxes on sales to the State of Illinois, its political subdivisions, agencies and instrumentalities which occurred prior to August 1, 1961.[3] Appellees are therefore entitled, all other considerations apart, to an injunction prohibiting the assessment or collection of taxes on sales to the United States which occurred prior to that date.

Secondly, although the Illinois Supreme Court declared that the exemption provisions worked an un-

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of 2½% of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1959, or after June 30, 1961, and at the rate of 3% of the gross receipts from such sales after June 30, 1959, and prior to July 1, 1961, excluding, however, from said gross receipts, the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes. * * *"

[3] 2 C.C.H. Ill. State Tax Reporter, Par. 200–208. It provides: "4. Effective *August 1, 1961*, retail sales to the State of Illinois and its political subdivisions will become subject to the retailers' occupation tax."

[4] The Illinois Supreme Court, even before the amendment of the statute, permitted the filing of a petition for rehearing in the *Holland* case, *supra*, on behalf of a group of charitable, religious and educational institutions as *amici curiae*, but has not yet acted on the petition.

constitutional discrimination, the statute, as of the date of decision, accorded exemptions *both* to the state (its political subdivisions, agencies and instrumentalities) and to charitable, religious and educational institutions. It is not clear whether the Illinois Supreme Court would hold the statutory exemption unconstitutional in its present form.[4] It does appear, however, that the Director of Revenue proposes to treat sales to governmental bodies as taxable and sales to charitable organizations as not taxable.[5] Thus, there remains the question, not considered by the court below or the Illinois Supreme Court in *Holland,* whether the taxing statute in its present form is unconstitutionally discriminatory.

Thirdly, we point out that the United States contended below that the statute was objectionable, apart from its discriminatory aspects, as constituting a direct tax on the "purchases of the Government itself." (*Kern-Limerick* v. *Scurlock,* 347 U.S. 110, 123). That question remains in the case.

We believe that orderly procedure would be served if the District Court were afforded an opportunity to consider whether the injunction should be vacated or modified by reason of the events which have occurred since it was issued. Accordingly, we respectfully suggest that this Court note probable jurisdiction, vacate the judgment below and remand the

[5] See *supra*, note 3. The bulletin of July 10, 1961, also says: "5. Sales to exclusively charitable, religious or educational organizations and institutions will continue to be exempt." and "6. While the Injunction in the *Olin Mathieson Company* case remains in effect, the Department will not attempt to collect tax on sales to the Federal Government or its contractors."

cause to the District Court for further consideration in the light of subsequent developments.* We submit, however, that the injunctive provisions of the judgment below should be continued in effect until further order of the District Court.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN H. CARUTHERS,
Attorney for Olin Mathieson Chemical Corporation.

AUGUST 1961.

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*We suggest the vacation of the District Court's judgment, notwithstanding our agreement with the decision below, so that the cause need not be retained on this Court's docket pending further consideration of the case in the court below.

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